

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

OSAGE WIND, LLC, et al.,

Defendant(s).

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No. 14-CV-704-GKF-JFJ

TRANSCRIPT OF TELEPHONIC STATUS CONFERENCE  
BEFORE THE HONORABLE GREGORY K. FRIZZELL  
UNITED STATES DISTRICT JUDGE

JULY 15, 2020

**REPORTED BY:**

**BRIAN P. NEIL, RMR-CRR**  
*United States Court Reporter*

A P P E A R A N C E S

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**Lynn H. Slade and Sarah Stevenson**, Attorneys at Law, Modrall, Sperling, Roehl, Harris & Sisk, P.O. Box 2168, Albuquerque, New Mexico, 87103, attorneys on behalf of the Defendants;

**Wilson Pipestem, Abi Fain, Mary K. Nagle**, Attorneys at Law, Pipestem Law, 320 South Boston Avenue, Suite 1705, Tulsa, Oklahoma, 74103, attorneys on behalf of the Intervenor.

Wednesday, July 15, 2020

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**DEPUTY COURT CLERK:** This is Case No.

14-CV-704-GKF-JFJ, United States of America v. Osage Wind, et al. Counsel, please state your appearances for the record.

**MR. PIPESTEM:** Your Honor, this is Wilson Pipestem from Pipestem Law on behalf of the Osage Minerals Council, and with me is Mary Kathryn Nagle, Abi Fain, and Zoe Latham.

**MS. MCCLANAHAN:** United States is represented by Catherine McClanahan and Nolan Fields with client Charles Babst also present.

**MR. RAY:** And good morning, Your Honor. On behalf of all defendants, Ryan Ray, and I have co-counsel on the line with me, Lynn Slade and Sarah Stevenson.

**THE COURT:** Good morning, counsel. This is Judge Frizzell. Let me start off by saying that the gist of the July 1st orders was that we are going to try the claims that are framed by the first amended complaint and to try the remedies sought by the United States in that first amended complaint.

In that regard, the United States alleged in the first amended complaint that defendants knew, or should have known, that they were required to comply with the express provisions of 25 CFR 211 or 25 CFR 214. It was not, and is not, the court's intent to bar discovery and to bar any dispute with

1 regard to the issue of innocent trespasser versus bad faith  
2 trespasser which, in my view, is an issue of the measure of  
3 damages for trespass; in other words, whether the defendants,  
4 while legally wrongdoers, acted in the honest belief that their  
5 conduct was lawful; or on the other hand, whether the defendant  
6 acted with culpable negligence or a willful disregard of the  
7 rights of others. We will issue a short order clarifying that  
8 position later today.

9 It would appear to me that you all have agreed to the  
10 lion's share of what should be pretrial deadlines and let me  
11 just get directly to that. You all have agreed to an exchange  
12 of preliminary witness and exhibit lists on September 4th of  
13 2020. You've agreed that the plaintiff's expert witness  
14 reports are due on September 18th of 2020, that the  
15 intervenor's expert reports are due on or before October 2nd of  
16 2020.

17 With respect to the defendants' reports, I'm going to  
18 set that deadline for October 30th of 2020. As for discovery  
19 cutoff, it would seem to me that with the real restrictions  
20 that have been imposed by COVID that the discovery cutoff  
21 should be December 18th of 2020, which would logically kick the  
22 date for dispositive motions to January of 2021. My suggestion  
23 is, because the first of the year is always kind of a difficult  
24 time, we would either set the 15th or the 22nd as a deadline  
25 for dispositive motions.

1 Is there any preference there? Mr. Ray?

2 MR. RAY: Your Honor, either would be fine. I think  
3 the court's correct, it would probably make sense to have that  
4 about 30 days after the close of discovery. I know that's been  
5 my experience in other cases. And so we certainly think that  
6 would be appropriate but have no particular preference with  
7 either one.

8 THE COURT: All right. Well, because we have  
9 Christmas and New Year's -- Mr. Pipestem, any preference there?

10 MR. PIPESTEM: No, Your Honor. I think we're --  
11 Mary Kathryn, do you have any thought on that?

12 Your Honor, do you mind if I defer to her?

13 THE COURT: Oh, of course.

14 MS. NAGLE: No. I think we're fine with that  
15 schedule, Your Honor.

16 THE COURT: All right. Well, let's just set -- and  
17 any problem with that, Ms. McClanahan.

18 MS. MCCLANAHAN: No, Your Honor.

19 THE COURT: All right. We will set January 22nd,  
20 which is a Friday, as a deadline for dispositive motions. And  
21 my thought is, because this is going to be tried to the court,  
22 we will not set a trial date until we've ruled on dispositive  
23 motions. The reason for that is non-jury trials are more  
24 easily set; in other words, we can more flexibly set a trial  
25 date for a nonjury trial and I'd like to get these summary

1 judgment motions resolved prior to going into a nonjury trial.

2 It's also my thought -- although we discussed the issue  
3 that we believe needed to be briefed before trial, it's my  
4 thought -- and I'll ask each of you, beginning with  
5 Ms. McClanahan, for your thoughts here -- but we outlined in  
6 the orders that we believed that briefing would be necessary  
7 with the issues of continuing trespass, ejectment, and res  
8 judicata. And because you all have agreed essentially to this  
9 schedule leading up to summary judgment motions, it would seem  
10 to us that we just see what issues are raised on summary  
11 judgment, and then to the extent that those issues are not  
12 addressed in the motions for summary judgment, then I would  
13 just direct you to file trial briefs with regard to those  
14 issues.

15 Any thoughts on that, Ms. McClanahan?

16 MS. MCCLANAHAN: I think that does make sense. So  
17 instead of having some piecemeal briefing here early, you're  
18 just saying that everything would be included in that January  
19 date?

20 THE COURT: Well, I mean, to the extent -- you all,  
21 frankly, will know the case better than I and so you'll be  
22 informing me of your views as to the facts and the law in those  
23 summary judgment motions. And then to the extent that any of  
24 those issues have not been wrestled with in the cross-motions  
25 for summary judgment, then I would simply direct you to file

1 trial briefs on the issues that I believe I would need to be  
2 fully educated prior to the nonjury trial.

3 MS. MCCLANAHAN: I think that makes perfect sense.

4 THE COURT: Mr. Slade and Mr. Ray?

5 MR. RAY: Your Honor, Ryan Ray here. I believe that  
6 makes sense as well. The one thing I would raise for  
7 discussion or to get the court's view is, the joint status  
8 report, I think, could be read that some, or maybe all of us,  
9 contemplate multiple summary judgment motions. I'm at least  
10 aware, Your Honor, of the local rule of there only being one,  
11 and so would just respectfully request clarity from the court  
12 as to whether more than one motion for summary judgment is  
13 contemplated by the court's directives in the order.

14 THE COURT: I think we'll cross that bridge when we  
15 get to it. I think discovery may well clarify facts and issues  
16 for you. To the extent that you believe at the time, as we run  
17 up on that January date, that more than one motion for summary  
18 judgment needs to be filed by a party, then simply file that  
19 motion seeking to file multiple motions for summary. It's a  
20 rare occurrence when that happens, but we'll just judge it on  
21 the merits as we approach that January day. How's that?

22 MR. RAY: Understood, Your Honor. Makes perfect  
23 sense. With that clarification, I believe that the manner the  
24 court has outlined proceeding makes perfect sense.

25 THE COURT: Ms. Nagle, Mr. Pipestem?

1           **MR. PIPESTEM:** Your Honor, we have no objection to  
2 that. That makes sense to us.

3           **THE COURT:** Let me just ask Mr. Ray, because  
4 defendants had stated that they may wish to submit a motion for  
5 summary judgment regarding equitable defenses, including  
6 laches, that struck me as an interesting proposition. Because  
7 typically I've always thought that equitable defenses are not  
8 necessarily amenable to summary judgment given that they are a  
9 weighing of equities. Your thoughts?

10           **MR. RAY:** And perhaps that may be, Your Honor. It  
11 depends on how facts develop in discovery. I think that's  
12 something that may, as we proceed, be pursued that way. It may  
13 be pursued, as the court says, by way of trial briefs as they  
14 develop.

15           **THE COURT:** I don't want to prejudge it, but it  
16 would seem to me that that would make most sense, to address  
17 those equitable issues in a trial brief.

18           What else ought we address? Ms. McClanahan?

19           **MS. MCCLANAHAN:** There are a couple things that come  
20 to mind, Your Honor. One thing that the parties are kind of at  
21 an impasse about also is the meaning of some language from your  
22 earlier orders, they were minute orders, docket 135 and docket  
23 138. When you denied the United States' motion to strike Osage  
24 Wind's answer, you added this sentence: "Issues determined by  
25 the Tenth Circuit are law of the case and affirmative defenses



1 going to those issues shall not be considered on remand." And  
2 then docket 138, a sentence that reads: "The remaining issues  
3 in this case involve the relief due to the Osage Mineral  
4 Estate."

5 So kind of like the good faith/bad faith, this has  
6 given us some heartburn as we try and work our way through  
7 discovery issues. The defendants have asked for literally tens  
8 of thousands of pages of e-mails and communications about  
9 things like the United States or the Solicitor's Office or the  
10 local installation up in Pawhuska talking to the OMC about  
11 things as far back as 2010 and 2011, I assume, to try to shore  
12 up some kind of an equitable defense.

13 That has presented an incredible hardship for us so far  
14 as to trying just to get those documents processed, culled out,  
15 and things like that. We've objected to that discovery based  
16 on the language of docket 135 and to a lesser extent, I guess,  
17 the docket 138 language, understanding that affirmative  
18 defenses are not being -- or are not allowed at this point in  
19 the litigation and that we are moving to the relief due to the  
20 Osage Mineral Estate.

21 **THE COURT:** Well, frankly, Ms. McClanahan, you're  
22 hitting me cold here and I don't have No. 135 or No. 138 in  
23 front of me.

24 You know, as I pointed out with regard to the measure  
25 of damages for trespass, this innocent trespasser versus bad

1 faith trespasser issue, sometimes the court will use language  
2 in an order for one purpose without realizing that it may be  
3 read to foreclose legitimate discovery in connection with  
4 another.

5 So as I sit here right now, I can't advise you with  
6 regard to the meaning of 135 and 138 as it -- as it impacts  
7 discovery. I apologize but I don't think there's any way I can  
8 do that here just on the fly.

9 MS. MCCLANAHAN: I understand, Your Honor. And this  
10 may be something that just has to bubble up through Judge Jayne  
11 as a discovery dispute.

12 The only other issue that I thought might be addressed  
13 today was the statement in the joint status report where the  
14 parties are kind of struggling with how to approach a  
15 settlement. So my thoughts -- and they were only on the part  
16 of the United States -- was that, you know, it seems  
17 appropriate to appoint a settlement judge at this point. I  
18 don't know if a formal settlement conference where everyone is  
19 called in is even feasible, but it may not be advisable in this  
20 kind of a case either.

21 I was thinking, you know, someone like a John Tucker or  
22 somebody like that, who knows complex litigation very well,  
23 could start the ball rolling maybe by talking to sides on the  
24 phone or start looking at the procedural history before we make  
25 a decision about a formal conference.

1           **THE COURT:** All right. Any objection from anyone if  
2 I just start the ball rolling with regard to that? I know  
3 there have been some problems with some mediators. As you  
4 might suspect, we have some individuals in our adjunct  
5 settlement program who are unafraid of sitting down with both  
6 sides; others have said that they will not do so. I could make  
7 inquiry as to whether or not Mr. Tucker would be interested in  
8 talking to all sides by telephone.

9           Any objection to that, Mr. Ray?

10           **MR. RAY:** No, Your Honor. I think as we put in the  
11 status report, there's not ever been a settlement conference in  
12 this case and we're ready to have one or to engage in any level  
13 of discussions. I, frankly, participated in a mediation about  
14 a month ago in which every participant was in a different  
15 location and we did it on a remote platform.

16           So we're flexible, Your Honor, and would like to and  
17 think it is the appropriate time to have a settlement  
18 conference in this case or some kind of discussions.

19           **THE COURT:** Ms. Nagle, Mr. Pipestem, any thoughts?

20           **MR. PIPESTEM:** Your Honor, the Osage Minerals  
21 Council would participate in that. We just worry that  
22 discovery where it is the timing may not be right. We had this  
23 discussion with counsel -- opposing counsel and we decided we'd  
24 probably get down the line a little bit further before these  
25 discussions could be fruitful but we would not oppose getting

1 the ball rolling.

2 THE COURT: Yeah. I fully understand that and you  
3 can simply convey that to Mr. Tucker or whoever else is  
4 appointed.

5 So that's a great idea, Ms. McClanahan. Anything else,  
6 Ms. McClanahan?

7 MS. MCCLANAHAN: Let me check with Mr. Fields. I  
8 don't think we have anything else on our punch list for today.  
9 Thank you, Your Honor.

10 THE COURT: All right. Thank you. Mr. Ray,  
11 anything else on your punch list?

12 MR. RAY: Your Honor, just very briefly. I would  
13 just -- if the court is looking into this issue at all that  
14 Ms. McClanahan raised, I would just respectfully invite the  
15 court to footnote 3 in the joint status report. Our position  
16 is, Your Honor, if the Tenth Circuit determined the question,  
17 then certainly those issues are no longer in the case. But to  
18 say that there are no defenses of any kind that can be pursued,  
19 especially equitable defenses, we, Your Honor, would just  
20 respectfully submit that that is incorrect. So I just would  
21 like to add that clarification.

22 And with that, Your Honor, I don't believe that the  
23 defendants have anything else unless Mr. Slade or Ms. Stevenson  
24 has something to add that I'm not thinking of.

25 MR. SLADE: Your Honor, this is Lynn Slade. Nothing

1 further from me.

2 THE COURT: Thank you, sir. Ms. Nagle or  
3 Mr. Pipestem?

4 MS. NAGLE: Hi, this is Ms. Nagle. I'm not sure --  
5 Wilson, are you going to be sharing anything?

6 MR. PIPESTEM: Well, I know we need to raise the  
7 issue of possibly filing an amended complaint. Maybe you can  
8 address that.

9 MS. NAGLE: Sure. So, Your Honor, you know, as you  
10 know, we filed our amended complaint and intervention pursuant  
11 to your July 1st order. But hearing what you had to say today  
12 during this conference, you know, specifically with regards to  
13 the fact that you did not intend to -- what I'm interpreting as  
14 a statement that you did not intend to preclude plaintiffs from  
15 making allegations or seeking discovery on claims that  
16 defendants' trespass was committed in bad faith or knowingly  
17 and intentionally, and certainly that is a claim that OMC feels  
18 that it has rightfully raised in this action.

19 I don't know if you've seen but there's sort of still a  
20 little bit of a remnant dispute in the joint status report  
21 between the amended complaint we did end up filing where the  
22 OMC did strike any reference to language such as "bad faith."  
23 We did keep language in the complaint referencing "knowingly  
24 and intentionally" and very much felt that was in line with the  
25 United States' first amended complaint; specifically, paragraph

1 49.

2 But, you know, I think just hearing what you had to say  
3 today, one concern I have for OMC is, you know, we don't want  
4 to lose our right to allege and seek remedies for a bad faith  
5 trespass. If we're all under the understanding that that's  
6 very much encompassed and included in the United States' first  
7 amended complaint and that's the operative complaint, then  
8 we're probably fine. But I'm wondering if the OMC needs to  
9 further amend its complaint to get that language with regards  
10 to the bad faith trespass back in there. Because we did take  
11 that out under a misunderstanding that that was what we needed  
12 to do to comply with Your Honor's July 1st order.

13 THE COURT: Well, my view -- this is Judge  
14 Frizzell -- my view is that this issue is part and parcel of a  
15 trespass issue with regard to the mining or recovery of oil and  
16 gas in the state of Oklahoma.

17 These cases -- I've focused -- or I've read these  
18 Oklahoma Supreme Court cases and they're really fascinating,  
19 *Dilworth* and *Edwards v. Lachman*, L-a-c-h-m-a-n, and I think  
20 it's just inherent that the measure of damages for trespass  
21 when a party comes in and takes mineral interests. We haven't  
22 even discussed another issue of whether the trespasser  
23 conferred benefits upon the rightful owner of the oil and gas  
24 rights which is another interesting twist.

25 One of the interesting issues here is whether that rule

1 is really intended to focus on oil and gas production. Because  
2 in that context, we can all understand how the production of  
3 oil and gas can actually benefit the rightful owner. But I  
4 think there's probably an issue here as to whether or not the  
5 mining of this limestone actually benefited the rightful owner  
6 of that mineral estate.

7 But the issue that's really before the court, or will  
8 be before the court, is whether or not the trespasser here is  
9 innocent or is not, or is a bad faith trespasser, and whether  
10 the trespasser is entitled to his mining costs. I think it's  
11 just part and parcel of a trespass claim in this context. So I  
12 don't think it's necessary to amend frankly.

13 And it's also interesting how the Oklahoma Supreme  
14 Court has said that to deny the trespasser the offset of the  
15 mining cost is equivalent to punitive damages, which is  
16 something that you really don't see in other contexts.

17 So in short, I don't think you need amend. I think  
18 it's just all inherent in the issues that have already been  
19 framed in the first amended complaint.

20 **MS. NAGLE:** Thank you, Your Honor. That's very  
21 helpful.

22 **THE COURT:** All right. Mr. Pipestem, anything else?

23 **MR. PIPESTEM:** Yes, Your Honor. There's one other  
24 issue we need to raise. As you're aware, the -- or I'm sure  
25 you're aware -- the U.S. Supreme Court made a decision in

1     *McGirt* related to the Muscogee (Creek) Nation reservation --

2             THE COURT: What's that case? I've never heard of  
3     it.

4             MR. PIPESTEM: Well, you can Google that when it's  
5     all over the place. So --

6             THE COURT: I'm definitely kidding.

7             MR. PIPESTEM: I know you're kidding. So the  
8     decision in *McGirt*, we have not fully analyzed whether that  
9     case would have some direct bearing on this case.

10            THE COURT: Right.

11            MR. PIPESTEM: So we don't have an answer for you on  
12     whether that is definitely an issue that will need to be  
13     raised, but we wanted to just identify it as one for the court  
14     that could be important to this case. We have not gotten  
15     direction yet from our client because of the newness of the  
16     case.

17            But to the extent that the rationale of *McGirt* could  
18     have a direct bearing on the *Irby* case and the authority of the  
19     Osage Nation to exercise jurisdiction on a business who comes  
20     onto the Osage reservation and enters into what would need to  
21     be a consensual agreement with the Osage Nation through its  
22     Minerals Council, we have not thought through all those  
23     implications but we just wanted to identify it for the court as  
24     an issue that we may want to raise at some point in the case.

25            THE COURT: Well, this is Judge Frizzell. I



1 anticipated that. But how do you get around *Irby* being a final  
2 decision of the Tenth Circuit? By the way, did you try to  
3 appeal *Irby* to the Supreme Court?

4 MR. PIPESTEM: Yeah. Cert was denied in *Irby*. I  
5 was not counsel in that case but certainly was involved, you  
6 know, keeping an eye on it as counsel for the Osage Nation on  
7 another case at the same time. So, again, we have not thought  
8 through exactly the implications on the Osage Nation.

9 Certainly we've looked at the case and what the Tenth  
10 Circuit said and analyzed in *Solem v. Bartlett* and some of the  
11 other cases. And so, again, we don't have an answer to that at  
12 this point. But rather than raise it at a later point when the  
13 court was -- where we hadn't said anything about it to the  
14 other parties, we thought we would just identify it as an issue  
15 today.

16 THE COURT: Thank you very much. Is there anything  
17 else that anyone would like to raise at this point? All right.  
18 Being none, thank you all very much and we are adjourned.  
19 Thank you.

20 *(The proceedings were concluded)*  
21  
22  
23  
24  
25

C E R T I F I C A T E

I, Brian P. Neil, a Certified Court Reporter for the Northern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in above-captioned case.

I further certify that I am not employed by or related to any party to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 20th day of July 2020.

s/ Brian P. Neil

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*Brian P. Neil, RMR-CRR  
United States Court Reporter*